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No.

In the Supreme Court of the United States

NAPERVILLE READY MIX, INCORPORATED, T&W TRUCKING, INCORPORATED, WEHRLI EQUIPMENT COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL 673,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the National Labor Relations Act requires a company to bargain over a decision to close part of its business, sell substantial assets, and then subcontract the work previously accomplished using those assets, simply because labor costs were a factor in that decision.

II. Whether the National Labor Relations Board violated the Administrative Procedure Act by failing to apply its "alter ego" analysis in concluding that a sale of assets was a "sham transaction," where it is undisputed that title to the assets had properly passed from one corporation to another.

CORPORATE DISCLOSURE STATEMENT

Naperville Ready Mix, Incorporated, T&W Trucking, Incorporated, and Wehrli Equipment Company are privately-held corporations. They have no parent companies and there are no publicly-held companies owning 10% or more of their stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Naperville Ready Mix, Incorporated, T&W Trucking Incorporated, and Wehrli Equipment Company (collectively "NRM"), respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. NRM seeks reversal of the Seventh Circuit's enforcement of the National Labor Relations Board's ("NLRB") finding that NRM violated §§8(a)(1), (3) and (5) of the National Labor Relations Act ("NLRA") by selling its delivery trucks and engaging independent contractors to perform delivery work without bargaining to impasse over this decision.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit enforcing the NLRB's decision is published at 242 F.3d 744 and is set forth in the Appendix, at App. 1. The Seventh Circuit's Order denying NRM's Petition for Rehearing and Suggestion for Rehearing En Banc is set forth in the Appendix, at App. 102.

The decision of the NLRB is published at 329 NLRB No. 19, 166 LRRM (BNA) 1244, and is set forth in the Appendix, at App. 24. The decision of the NLRB Administrative Law Judge is set forth in the Appendix, at App. 76.

JURISDICTION

On March 6, 2001, the Seventh Circuit enforced the NLRB's determination that NRM violated NLRA §§8(a)(1), (3), and (5). 29 U.S.C. §§158(a)(1), (3) and (5). (App. 1). On May 17, 2001, the Seventh Circuit denied NRM's timely Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 102). This Petition for Certiorari is timely filed within 90 days of the latter order.

NRM invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) and 29 U.S.C. §160(e).

STATUTES INVOLVED IN THIS CASE

The relevant text of Section 7 of the National Labor Relations Act, 29 U.S.C. §157, is reproduced in the Appendix, at App. 104.

The relevant text of Sections 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), (3), (5), and (d) is reproduced in the Appendix, at App. 104-105.

The relevant portion of the Administrative Procedure Act, 5 U.S.C. §706, is reproduced in the Appendix, at App. 105-106.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION

The Court of Appeals had jurisdiction pursuant to 29 U.S.C. §160(f), which provides that any person aggrieved by a final order of the NLRB may petition for review of the NLRB's Decision and Order in the Circuit where the alleged unfair labor practice occurred.

STATEMENT OF FACTS

Events Leading Up To The Unfair Labor Practice Charges

NRM sells ready-mix concrete to commercial customers. Since the early 1960s, NRM owned and operated a fleet of concrete delivery trucks, and it employed truck drivers represented by Teamsters Local 673 (the "Union"). Until April 1992, NRM's drivers worked under a series of collective bargaining agreements.

In May 1992, after the expiration of the collective bargaining agreement and during negotiations with the Union for a new contract, NRM decided to restructure its business operations. Facing strong competitive pressures and some financial difficulties, NRM's President, Richard Wehrli, determined that it was in NRM's best interest to get out of the concrete delivery business and sell all of NRM's concrete delivery trucks. Wehrli knew that once NRM removed itself from the concrete delivery business, it could use independent contractors to ensure the continued delivery of concrete to its customers.

On May 12, 1992, Wehrli sent the Union's bargaining representative the following letter:

> I have decided to go out of the trucking business and am offering to sell my trucks to my present drivers first, and then any leftover trucks will be offered to outsiders. I intend to use individual contractors for all my trucking needs. If you want any discussion with me in this regard feel free to call.

(App. 3). The Union refused to discuss Wehrli's offer to sell trucks to his drivers. In six subsequent bargaining sessions, the Union rejected all of Wehrli's bargaining proposals to change the collective bargaining agreement so that it would not restrict NRM's use of independent contractors.

NRM's truck sale plan faced an urgent deadline. If NRM sold its trucks before July 1, 1992, it could avoid paying over $40,000 in license renewal fees. (App. 32). Confronted with this fiscally-important deadline and the Union's intransigence, NRM unilaterally implemented its truck sale plan and sold all of its concrete delivery trucks. Ten trucks were purchased by three of NRM's current drivers (who became independent owner-operators), and another seven trucks were purchased by three others, including two individuals who responded to NRM's newspaper advertisement. NRM properly transferred legal title to the trucks,

and title to each truck was ultimately held by wholly separate corporate entities owned by the purchasers. The trucks were sold for purchase prices totaling $870,000.

To facilitate the truck sales and to ensure sufficient access to independent contractors, NRM offered favorable secured financing to the truck purchasers in exchange for the purchasers' agreement to give NRM first priority in their concrete hauling work. Aside from this first priority obligation, the independent contractors were free to pursue other work and run their businesses as they saw fit.

The Unfair Labor Practice Charges and The Administrative Law Judge's Decision

In June and July 1992, the Union filed unfair labor practice charges against NRM, asserting, *inter alia*, that NRM had violated NLRA §§8(a)(1) and (5) by implementing its truck sale plan without first bargaining to impasse with the Union.

The legal analysis of a company's bargaining obligations is framed by three cases from this Court—*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), *Textile Workers Union of America v. Darlington Manuf. Co.*, 380 U.S. 263 (1965), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In proceedings before Administrative Law Judge Robert Wallace (the "ALJ"), the NLRB General Counsel argued that NRM's truck sales were illegitimate "sham transactions," that NRM continued to control the trucks despite their sale, and that NRM had engaged in nothing more than a pure subcontracting arrangement—a mandatory subject of bargaining under *Fibreboard*. In response, NRM demonstrated that the truck sales were legitimate, arms-length transactions and that title and control of the trucks had properly passed to third-party corporations that were separate and distinct from NRM. As such, NRM's truck sales were part of a legitimate

entrepreneurial partial-closing decision which, under *Darlington* and *First National Maintenance*, is not a mandatory subject of bargaining. Although NRM ultimately subcontracted its concrete delivery work, it did so as part of a plan to terminate its direct involvement in trucking operations and its ownership of trucking assets.

Following an extensive evidentiary hearing, the ALJ issued a decision on October 13, 1995 rejecting the General Counsel's "sham transaction" argument and finding that NRM had no duty to bargain over its truck sales. (App. 76, 90, 100). The ALJ determined that since NRM engaged in a legitimate entrepreneurial decision to sell its assets and quit the trucking portion of its business, it had no mandatory bargaining obligation under *Darlington*. (App. 90, 100). 380 U.S. 263. *See also First National Maintenance*, 452 U.S. 666. Without a bargaining violation, the other charges against NRM had no foundation and were also dismissed by the ALJ.

The NLRB Proceedings

Almost four years later, on September 21, 1999, the Board reversed the ALJ. Like the ALJ, the Board focused on NRM's truck sales, stating that "whether [NRM] went out of the trucking business . . . *is really the pivotal question*" and that "[t]o answer this, we must look at the transactions which governed the transfer of trucks from NRM[.]" (App. 42) (emphasis added). Unlike the ALJ, however, the Board found that NRM's truck sales were "sham transactions" and that NRM continued to control the trucks despite their sale to third-party corporations. (App. 47-48, 52). In reaching this conclusion, the Board never applied its alter ego doctrine, which has been the basis for all prior findings of a "sham transaction" with respect to the sale of corporate assets. The Board provided no legal support for a finding that NRM asserted control over

trucks that were owned and operated by corporations wholly separate from NRM.

According to the Board, NRM did not engage in a *First National Maintenance* partial closing because NRM did not truly sell its trucks. Consequently, the Board concluded that NRM did nothing more than substitute subcontracted employees for its unionized employees—an arrangement that cannot be undertaken without first bargaining with the Union to impasse. (App. 52-53). *Fibreboard*, 379 U.S. at 404. As a result, the Board found merit in the other allegations of the Complaint and ordered reinstatement and backpay for all of the drivers who lost their jobs due to NRM's sale of its trucks.

Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Seventh Circuit, NRM principally disputed the Board's analysis of the "pivotal question"—the legitimacy of NRM's truck sales. NRM assumed, as did the General Counsel, ALJ, and NLRB, that this case would be governed by *First National Maintenance* (and that NRM would have no bargaining obligation) if NRM's truck sales were deemed legitimate, not "sham" transactions. Accordingly, NRM illustrated how the Board's "sham transaction" conclusion was both factually unfounded and based on an arbitrary and capricious legal analysis that failed to adhere to the Board's established "alter ego" precedents.

Despite the fact that this case had always focused on the legitimacy of NRM's truck sales, the Seventh Circuit found the truck sales entirely irrelevant. According to the Court:

> NRM has devoted considerable energy in its appellate briefs to explaining why the sales were not "sham transactions," as that term is used in alter ego or single employer cases. . . But, as we read the Board's

> opinion, it was not invoking that doctrine (despite its somewhat careless use of the phrase "sham transaction" here and there). It was not the Board's contention that NRM continued to own the trucks at issue; there is no dispute that title was legally transferred. The Board was saying only that the transactions were phony, or "sham" insofar as their employment consequences were concerned. NRM sold the trucks, but it did so as part of a plan that allowed it to remain in the business of delivering ready-mix, albeit using non-union subcontractors instead of bargaining unit employees.

(App. 12-13). Chalking-up the Board's "sham transaction" findings to mere carelessness, the Seventh Circuit determined that NRM engaged in *Fibreboard* subcontracting *regardless* of whether or not it sold any assets. According to the Court, NRM's consideration of labor costs in its decision *automatically* imposed a bargaining obligation:

> After *Fibreboard* and *First National Maintenance*, when an employer chooses to subcontract unit work in order to save on labor costs, that choice typically does not involve a change in the scope and direction of the enterprise and thus is not a core entrepreneurial decision beyond the scope of the Act's bargaining obligation.
>
> . . .
>
> [T]he plan to move to an owner-operator system was motivated by a desire to reduce labor costs. This is precisely the kind of concern that *Fibreboard* and *First National Maintenance* instruct is particularly amenable to resolution through collective bargaining.

(App. 13-14). As a result, the Seventh Circuit never considered NRM's principal arguments about the legitimacy of its truck sales and about the Board's arbitrary and capricious failure to follow its established precedents.

NRM is now compelled to restore its nine-year defunct trucking operation, pay nine years back pay with interest to its terminated truck drivers, and reinstate those drivers to their former positions.

REASONS FOR GRANTING THE WRIT

I.

IN THE TWENTY YEARS SINCE *FIRST NATIONAL MAINTENANCE* AND THE THIRTY-SEVEN YEARS SINCE *FIBREBOARD*, THE APPLICATION OF THESE TWO CASES HAS BECOME CONFUSING FOR BUSINESSES AND COURTS ALIKE

How can a company determine whether or not it has a duty to bargain in a given situation when, as in this case, the adjudicating bodies—the ALJ, NLRB, and Seventh Circuit—could not agree on the proper legal analysis, let alone the proper application of that analysis to the facts?

In this case, the General Counsel, ALJ, and NLRB all recognized the importance of the truck sales in determining whether this case is a *Fibreboard* (subcontracting) case or a *Darlington/First National Maintenance* (entrepreneurial partial closing) case. Consequently, the ALJ and NLRB focused their Opinions primarily on the truck sales and on whether NRM continued to control the trucks after their sale. The Seventh Circuit, however, considered the truck sales completely irrelevant, finding instead that NRM's bargaining obligations hinged exclusively on whether NRM considered labor costs in its decision to sell its trucks and subcontract its delivery work.

The disparate analyses employed by the ALJ and NLRB on one hand, and the Seventh Circuit on the other, highlight the confusion prevalent in the application of *Fibreboard* and *First National Maintenance*. The ALJ and the NLRB rightly focused on the extent to which NRM continued to control the trucks after their sale; the Seventh

Circuit ignored the partial closing aspects of this case and treated it like a pure subcontracting case. These conflicting approaches, apparent in this case and others, create tremendous uncertainty as to when companies may legitimately sell their assets and change the direction of their businesses without running afoul of the NLRA. Without more definitive guidance from this Court, a business considering a partial closing faces a Hobson's choice: either (a) risk an enormous back-pay award and the restoration of long-defunct operations if the Board later conjures up a bargaining requirement; or (b) bargain with the Union to impasse (which unions are adept at delaying, if not wholly avoiding) and lose much of the speed and flexibility that is often necessary to implement a partial closing decision in a competitive business environment.

To replace the current ambiguity, this Court should announce a clear rule that when a company decides for entrepreneurial reasons to sell substantial assets and close part of its business, it has no obligation to bargain over this decision, regardless of whether the company later engages in subcontracting and regardless of whether labor costs may have been a factor in the decision. Such a rule would protect long-recognized, fundamental entrepreneurial rights, would guide the Board and the courts to more principled decisions, and would provide the clarity businesses need to conform their actions to the law.

A. *Fibreboard* and *Darlington/First National Maintenance* outline the scope of NLRA bargaining obligations in partial closing and subcontracting situations

The NLRA requires collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. §158(d). A company may not unilaterally implement a change in a subject encompassed by this definition with-

out first bargaining to impasse with the Union. *First National Maintenance*, 452 U.S. at 675. The scope of the NLRA's bargaining mandate was the subject of the *Fibreboard* and *Darlington/First National Maintenance* decisions.

1. The *Fibreboard* Decision

Fibreboard involved a pure subcontracting decision. The company, which was concerned about high labor costs in its maintenance operations, decided to hire an independent contractor to perform its maintenance work and replace its unionized maintenance staff. 379 U.S. at 205-206. The independent contractor only provided Fibreboard with a labor force—*Fibreboard continued to own the equipment used by the contractors*. *Id.* at 213. Fibreboard simply substituted one set of workers for another—everything else remained the same. *Id.*

This Court determined that, under those facts, Fibreboard had a duty to bargain to impasse with the Union before implementing its subcontracting decision. Fibreboard's subcontracting decision was well-suited for collective bargaining because:

> The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. *No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment*. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

Id. at 213 (emphasis added).

In an influential concurring opinion, Justice Stewart elaborated on the limits of the *Fibreboard* holding. He cautioned against requiring a company to bargain over core entrepreneurial decisions, such as the commitment or use of capital assets, because this would impermissibly infringe on a company's freedom to operate its business effectively. As he stated,

> An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. *Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.*

Id. at 223 (Stewart, J. concurring) (emphasis added). According to Justice Stewart, the key fact that distinguished Fibreboard's subcontracting decision from a core entrepreneurial decision was the employer's level of continued *control*:

> On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant *under the ultimate control of the same employer. . . . This kind of subcontracting falls short of such larger entrepreneurial questions as* what shall be produced, *how capital shall be invested in fixed assets*, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

Id. at 224-225 (Stewart, J. concurring) (emphasis added).

2. The *First National Maintenance* Decision

In its 1981 decision in *First National Maintenance*, this Court built on Justice Stewart's *Fibreboard* concurrence and on the 1965 *Darlington* decision, which held that a company had no bargaining obligation over a decision to completely shut down its operations. *Darlington*, 452 U.S. 666. First National Maintenance, which provided housekeeping services under contract with various business customers, was challenged for failing to bargain about its decision to cease operations at one customer's location and terminate the employees who worked there. *First National Maintenance*, 452 U.S. at 668-670. Quoting extensively from Justice Stewart's *Fibreboard* concurrence, this Court held that First National Maintenance's partial closing decision was not a mandatory subject of bargaining. As the Court explained:

> [T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of §8(d)'s "terms and conditions" . . . over which Congress has mandated bargaining.

Id. at 686.

The *First National Maintenance* Court flatly rejected mandatory bargaining over partial closing decisions, even if such decisions are based on labor cost reasons. As the Court stated, "If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer *voluntarily* with the union to seek concessions that may make continuing the business profitable." *Id.* at 682 (emphasis added). Entrepreneurial rights trump the NLRA's collective bargaining requirements. *Id.* at 678-79 ("Management must be free from the

constraints of the bargaining process to the extent essential for the running of a profitable business.").

B. There Is Tremendous Confusion Over The Proper Application of *Fibreboard* and *Darlington/First National Maintenance*

After *Fibreboard* and *Darlington / First National Maintenance*, the legal landscape can be summarized as follows: a partial closing decision is not a mandatory subject of bargaining; a subcontracting decision is a mandatory subject of bargaining, except where it involves a change in the scope or direction of the enterprise. Confusion arises, however, in cases like this one that intersect both *Fibreboard* and *Darlington / First National Maintenance*. How do you characterize such cases? What distinguishes a "subcontract" from a "partial closing" when a company both closes part of its business and subcontracts the work? Does the distinction hinge on the extent of the company's continued control of the assets and the labor force, or does the distinction hinge on whether the company considered labor costs in its decision? The Board and the Courts of Appeals have provided no clear answers to these questions.

1. This case illustrates the confusion in the law

In this case, the General Counsel, ALJ, and NLRB all agreed on the pivotal question—whether NRM continued to control the trucks after their sale. (App. 42, 92). NRM had no duty to bargain if it legitimately sold its trucks (*First National Maintenance*); NRM only had a duty to bargain if it continued to control the trucks and their drivers even after the asset sale (*Fibreboard*). This is why the Board elaborated on the particulars of NRM's truck sales and on NRM's level of continued involvement with the trucks. (App. 47-53). If the truck sales were irrelevant

to the analysis, and NRM had a duty to bargain regardless of the truck sales, neither the General Counsel nor the NLRB would have bothered to analyze these transactions in such detail.

But to the Seventh Circuit, the Board's detailed truck-sale analysis was merely "careless" use of language. (App. 12). The Seventh Circuit proceeded to ignore the partial-closing aspects of this case and instead treated it like a prototypical subcontracting case. Strikingly, the Seventh Circuit pronounced that there was "no dispute" that NRM had in fact relinquished ownership of the trucks. (App. 12). To the court, however, NRM's truck sales were completely irrelevant because NRM had engaged in subcontracting—which made this a *Fibreboard* case—*regardless* of any asset sale. Under the court's view, NRM's consideration of labor costs as one of the reasons for its truck-sale plan *automatically* meant that NRM must bargain with the Union over this decision. (App. 13-15).

2. The "labor costs" rationale utilized by the Seventh Circuit and other courts in subcontracting/partial closing cases is fundamentally unworkable

a. The varying approaches of the Courts of Appeals

The Seventh Circuit thought that the dispositive distinction between *Fibreboard*-type subcontracting and a *First National Maintenance* partial closing is whether the company considered labor costs in its decision. (App. 13-14) ("After *Fibreboard* and *First National Maintenance*, when an employer chooses to subcontract unit work in order to save on labor costs, that choice typically does not involve a change in the scope and direction of the enterprise and

thus is not a core entrepreneurial decision beyond the scope of the Act's bargaining obligation."). The D.C. Circuit apparently agrees. In *Rock-Tenn Co. v. NLRB*, the D.C. Circuit concluded that a company's consideration of labor costs determines whether or not it has a duty to bargain, stating:

> *First National Maintenance* must be seen, then, as simply drawing a boundary—albeit a tenuous one—between decisions that appear to be driven *primarily* by labor cost considerations and those that are not; the latter are the more core entrepreneurial decisions which, as the Court noted, Justice Stewart spoke of in his concurring opinion in *Fibreboard*.

101 F.3d 1441, 1445 (D.C. Cir. 1996).

To the contrary are the Third and Fourth Circuits. In *Arrow Automotive Indus., Inc. v. NLRB*, the Fourth Circuit criticized the use of labor cost considerations to distinguish mandatory from non-mandatory bargaining situations, stating:

> As a general matter, the Board's labor-costs standard provides scant guidance or predictability to companies faced with fundamental business decisions. It also establishes an exception to the *First National Maintenance* decision that threatens to swallow its rule. As one commentator has noted, the Board's standard is problematic in itself because "management decisions may turn on labor costs *and* involve a fundamental change in the business."

853 F.2d 223, 227 (4th Cir. 1988). "Labor costs are inescapably a part of the economic picture of the enterprise, and management's consideration of them in basic business decisions does not render *First National Maintenance* inapplicable." *Id.* at 228 (holding that the company had no duty to bargain over a decision to close one of its manufac-

turing plants, regardless of whether the closing decision was motivated by labor cost reasons).

In *Dorsey Trailers, Inc. v. NLRB*, the Third Circuit likewise questioned the "labor costs" rationale. 134 F.3d 125 (3d Cir. 1998). Dorsey, a manufacturer of truck trailers, faced such a large backlog of orders that it decided to subcontract some of its production work. The Union objected, claiming that Dorsey's own unionized employees could perform this work if Dorsey were willing to pay them overtime. Thus, to the Union, Dorsey's decision directly implicated labor costs. While the court recognized that a company should have a bargaining obligation if it makes a decision *solely* based on labor costs, the court agreed with the Fourth Circuit that a company can consider labor costs, along with other economic factors, in deciding to subcontract without incurring a mandatory bargaining obligation. As the court stated,

> [E]mployers may make business decisions based on general "economic reasons," which "are not reasons distinct and apart from a desire to decrease labor costs," but that does not mean that labor costs are somehow implicated by every employer's decision intended to improve the business's bottom line.

Id. at 133 (quoting *Furniture Rentors v. NLRB*, 36 F.3d 1240, 1249-50 (3d Cir. 1994)).

b. The extent to which a company considers labor costs in making an entrepreneurial business decision is an unreasonably vague standard to distinguish between mandatory and non-mandatory bargaining situations

There is simply no clear guidance from either the Board or the Courts of Appeals about how much weight to assign

a company's consideration of labor costs in determining whether to impose a mandatory bargaining obligation. On one end of the spectrum, the Seventh Circuit in this case implied that any consideration of labor costs imposes an absolute duty to bargain. On the other end of the spectrum, the Third and Fourth Circuits indicate that labor cost considerations are dispositive in subcontracting situations only if they are the *sole* reason for the company's decision, and they are never dispositive in partial closing situations.

It is fundamentally impracticable to distinguish between mandatory and non-mandatory bargaining based on the extent to which a company considered labor costs in its decision. Every rational decision by an employer to shut down part of its business is driven by profit motivations. Consequently, almost all such decisions include labor cost considerations, since a reduction in labor costs necessarily impacts profitability. As Justice Brennan noted in his *First National Maintenance* dissent, "Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation—if the employees have the opportunity to offer such concessions." 452 U.S. 666, 690 (Brennan, J. dissenting). Thus, the use of labor costs as the distinguishing factor in duty-to-bargain cases simply provides no meaningful guidance to companies seeking to comply with the law.

C. Control of the assets and labor force should properly distinguish a *Fibreboard* subcontracting case from a *First National Maintenance* entrepreneurial partial closing case

Instead of using labor costs to distinguish a *Fibreboard*-type subcontracting case from a *First National Maintenance* entrepreneurial partial closing case, the Board and the courts should distinguish such cases based on the

extent to which the company continues to control the assets and labor force after the partial closing/subcontracting decision. If a company engages in subcontracting without first legitimately selling or relinquishing control of substantial assets, *Fibreboard* should apply, since the company is simply substituting one set of employees for another. Alternatively, if a company subcontracts work but first engages in a legitimate sale of the assets necessary to maintain part of its business, *First National Maintenance* should apply, since the company's asset sale demonstrates its commitment to changing the scope and direction of the enterprise. As Justice Stewart's *Fibreboard* concurrence makes clear, a company's continued *control* of the assets and the labor force is the key issue distinguishing whether a case is governed by *Fibreboard* or whether a case involves a core entrepreneurial decision that is not subject to a mandatory bargaining obligation. *Fibreboard*, 379 U.S. at 224 (Stewart, J. concurring).

Examining the issue of control in the instant case, NRM should have no duty to bargain. Unlike Fibreboard Paper Products, NRM made a core entrepreneurial decision, namely to sell its trucks. Although NRM ultimately utilized independent trucking contractors to deliver concrete to its customers, *it no longer owned, operated, or controlled any trucks*. NRM did not simply substitute one set of employees for another as the employer in *Fibreboard*; rather, NRM liquidated aging assets and shut down part of its business. It is this sale of assets that distinguishes NRM's case from *Fibreboard*. *See e.g. Fibreboard*, 379 U.S. at 223 (Stewart, J. concurring) ("An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control."). Of prime importance, once NRM had sold its trucks—an en-

trepreneurial decision—the Union could no longer affect NRM's decision through wage or other bargaining concessions.

An instructive case on this issue is *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). In *Adams Dairy*, the Eighth Circuit held, on facts virtually identical to NRM's case, that the company had no obligation to bargain over its decision to liquidate its milk delivery operation and replace its employee-drivers with independent contractors. The *Adams Dairy* court found that the company's decision to sell its trucks was a basic operational change and not simply a *Fibreboard* substitution of one set of employees for another. As the court stated:

> [A] basic operational change did take place when the dairy decided to completely change its existing distribution system by selling its products to independent contractors. After the decision was made by the dairy to sell its products dockside to independent distributors, *all of the trucks used previously by driversalesmen were sold to independent contractors*. . . Adams was not directly concerned with whether or not any given distributor sustained a profit or loss, as would have been the situation with the driver-salesmen.

Adams Dairy, 350 F.2d at 111 (emphasis added). The court determined that:

> Contrary to the situation in *Fibreboard*, then, there is more involved in Adams Dairy than just the substitution of one set of employees for another. In Adams Dairy there is a change in the basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. *To*

> *require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs.*

Id. (emphasis added).[1]

D. This Court's Guidance Is Urgently Needed To Clarify the Proper Analysis In Cases Where *Fibreboard* and *First National Maintenance* Intersect

A clear rule establishing that the level of asset and workforce control distinguishes *Fibreboard* subcontracting from a *First National Maintenance* entrepreneurial partial closing would have several advantages over the vague "labor costs" standard. It would better protect the fundamental entrepreneurial rights of businesses, would eliminate many of the vagaries of the current standardless adjudication, and would provide the guidance businesses

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[1] In *First National Maintenance*, this Court cited *Adams Dairy* as an example of a case finding no duty to bargain because of a business' change in operations. 452 U.S. at 673 fn.8. Further, the NLRB in *West Virginia Baking* cited *Adams Dairy* as an example of a company making a fundamental change in the scope of its enterprise and adopted the following statement regarding the case:

> [I]f *Adams Dairy* [citation omitted] were before us today, we would hold that a decision to "subcontract" is not subject to Section 8(d), because the employer's decision there to discontinue its distribution operation and to contract out turned upon a fundamental change in the scope and direction of the enterprise. The employer retained no control over the equipment or the employees in the subcontractors' distribution system.

299 NLRB 306, 313 (1990) (quoting *Otis Elevator Co.*, 269 NLRB 891, 893 (1984)).

need to conform their actions to the law. When a company relinquishes control of substantial assets, it should have no duty to bargain over this decision regardless of whether its decision was motivated by labor costs or whether the company later subcontracts work formerly accomplished using those assets.

1. Clarification of *Fibreboard* and *First National Maintenance* would protect fundamental entrepreneurial rights

This Court has long recognized the fundamental right of businesses to be free from unreasonable and unnecessary constraints. *See e.g. First National Maintenance*, 452 U.S. at 678 ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."). Although unionized companies have certain obligations under the NLRA, these businesses still have fundamental entrepreneurial rights that cannot be abridged. *First National Maintenance*, 452 U.S. at 680-86; *Fibreboard*, 379 U.S. at 223-24 (Stewart, J. concurring).

Giving a union the power to impede core entrepreneurial decisions—such as NRM's truck sale decision in this case—provides the union with an unfair economic weapon that can be used to halt important, time-sensitive business decisions.[2] *First National Maintenance*, 452 U.S. at 676 ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Decisions to divest assets should not

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[2] For example, NRM's truck sales were time-sensitive because, as noted by the Board, NRM could save $40,000 in license renewal fees if it sold its trucks by July 1, 1992. (App. 32, n.11).

be held hostage by a union's ability to bargain ad infinitum while avoiding impasse. *First National Maintenance*, 452 U.S. at 686 ("the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself [is not a mandatory subject of bargaining].").

2. Clarification is necessary to provide businesses with the reasonable level of certainty they need to conform their actions to the law

"The courts of appeal and the Board, unable to articulate general principles that define the scope of mandatory bargaining, have often resorted to ad hoc weighings of employer and employee interests, the outcomes of which inevitably seem to express the tribunal's own values concerning appropriate labor objectives." Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447, 1448 (1982). A clearer articulation of a company's bargaining obligations would result in more principled decision-making by the Board and the Courts. Without such guidance, the Board's decisions in this area will continue to fluctuate.

As this Court recognized in *First National Maintenance*, companies must "have some degree of certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice." 452 U.S. at 678. Companies simply cannot afford the risks attendant with not knowing whether bargaining will be required in a given situation. As in NRM's case, a company might ultimately be forced to pay a tremendous amount in back pay and be ordered to reinstate

a long-defunct operation, regardless of the expense or utility of doing so. With the vague "labor costs" standard, companies can never know for sure how the Board or the courts will ultimately perceive their decisions. A clearer rule on bargaining obligations would promote economic efficiency by better allowing businesses to conform their actions to the law.

Twenty years ago, this Court granted certiorari in *First National Maintenance* because of the importance of the issues presented and because of confusing and often conflicting analyses utilized by the Board and Courts of Appeals. 452 U.S. at 674. Once again, this Court should grant certiorari to clarify this important issue affecting the fundamental entrepreneurial rights of businesses and their ability to predict whether their actions will run afoul of the law.

II.

THE NLRB ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER VIOLATIVE OF THE ADMINISTRATIVE PROCEDURE ACT WHEN IT FOUND THAT NRM HAD ENGAGED IN A "SHAM" SALE OF ASSETS TO THIRD PARTY CORPORATIONS WITHOUT APPLYING ITS ESTABLISHED ALTER EGO TEST OR ARTICULATING A REASONED EXPLANATION FOR ITS DEPARTURE FROM THIS PRECEDENT

As noted above, the proper way to determine whether *Fibreboard* or *First National Maintenance* governs a case such as this, and consequently whether a company has a bargaining obligation, is to look at whether there is a bona fide asset sale. In this case, although the Board rightfully understood that the truck sales were the key issue, it analyzed the truck sales in an arbitrary manner and wrongfully concluded that the truck sales were "sham transactions." The Board reached this conclusion without following its established precedent—the alter ego test—

which it ordinarily utilizes to determine whether corporate asset transfers are legitimate or "sham." Had the Board applied the alter ego test here, it would have been required to conclude that this is a *First National Maintenance* entrepreneurial partial closing case because NRM no longer owned or controlled the trucks after their sale. The Board's failure to follow its alter ego precedent amounts to arbitrary and capricious agency action violative of the Administrative Procedure Act ("APA"). 5 U.S.C. §706(2)(A).

A. The Board Acted In An Arbitrary And Capricious Manner By Concluding That NRM's Truck Sales Were "Sham Transactions" Without Applying Its Alter Ego Doctrine

The APA governs judicial review of administrative agency actions, including the actions of the NLRB. *Allentown Mack Sales and Svc., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). The APA mandates that reviewing courts set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The APA "establishes a scheme of 'reasoned decisionmaking,'" requiring that agencies ground their decisions in logic and rationality. *Allentown Mack*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Under this scheme of reasoned decisionmaking, the Board, like all agencies, must adhere to its established precedents or "justify its departure from its prior decisions so that we may understand what policies it is pursuing." *Atchison, Topeka & Santa Fe Rwy. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 822 (1973). *See also Allentown Mack*, 522 U.S. at 376. When an agency acts irrationally or fails to explain a departure from precedent, its action is arbitrary and capricious and violative of the

APA. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 153 (3d Cir. 1994); 5 U.S.C. §706(2)(A).

In the instant case, the Board concluded that NRM's truck sales were "sham transactions." But since title to the trucks passed to independent third parties—a fact the Seventh Circuit expressly recognized—how could the truck sales be "sham transactions"? Even though the truck purchasers were obligated to provide NRM with first priority in concrete hauling work, they were free, as titleholders, to do whatever they wanted with the trucks. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1063-64 (D.C. Cir. 2001) (when title passes to new owners, "this *alone* suggests the sales . . . were not 'sham transactions.'") (emphasis added). They could have sold the trucks outright and quit the trucking business altogether. They could have used the trucks for purposes other than hauling concrete or could have hauled concrete for companies other than NRM. The truck purchasers always had complete dominion over their trucks, and NRM had no enforceable right to disrupt this dominion.

Since NRM had no legal right to control the trucks, the only logical way for the Board to conclude that NRM maintained "control" over the trucks would be to find that NRM dominated or controlled the purchasing companies themselves. Corporations, however, are presumed at law to be "separate and distinct entities." *Alkire v. NLRB*, 716 F.2d 1014, 1018-21 (4th Cir. 1983); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 753 (7th Cir. 1989). Prior to this case, whenever the Board questioned whether a transfer of assets between corporations was a "sham" designed to evade NLRA responsibilities, or whether one corporation was under the de facto *control* of another, the Board invariably applied the alter ego doctrine. *See e.g. C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990) ("alter ego analysis . . . is typically applied

where an employer attempts to avoid its obligations under a collective bargaining agreement . . . through a *sham transfer of assets*.") (emphasis added); *NLRB v. Dane Cty. Dairy*, 795 F.2d 1313, 1321 (7th Cir. 1986); *West Virginia Baking*, 299 NLRB at 313 (referring to a lack of "*alter ego* or *sham devices*" as distinguishing a partial closing situation from a subcontracting situation) (emphasis added).[3] The alter ego doctrine provides an analytical framework through which the Board can look past the presumption of corporate separateness and decide in a principled fashion whether corporations are truly independent of one another. *See e.g. Alkire*, 716 F.2d at 1018-21; *Esmark, Inc.*, 887 F.2d at 753-54 ("the NLRB has recognized this basis [the disregard of corporate separateness] for piercing the corporate veil in its 'single employer' doctrine . . . The Board's 'alter ego' doctrine is similar").

In *Douglas Foods Corp. v. NLRB*, decided after the Seventh Circuit's ruling in this case, the D.C. Circuit recognized the importance of the Board's "alter ego" doctrine in a case strikingly similar to this one. 251 F.3d at 1062-1064. In that case, the Board's failure to apply its alter ego test resulted in the D.C. Circuit reversing the Board's finding

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[3] Other cases include the following: *Korns Bakery, Inc.*, 326 NLRB 1083, 1089 (1998) (adopting ALJ decision stating, "the *alter ego doctrine* focuses on a respondent's attempt to avoid the obligations of a collective bargaining agreement through a *sham transaction* or mere technical change") (emphasis added); *IWG, Inc.*, 322 NLRB 69 (1996); *Perma Coatings, Inc.*, 293 NLRB 803, 834 (1989) ("It has long been clear that an employer cannot evade its bargaining obligations under the Act . . . by an expedient formation of what appears to be a new company, but what in fact is but a 'disguised continuance,' or alter ego of the original employer"); *Marino Elec., Inc.*, 285 NLRB 344, 351 (1987); *Stardyne*, 41 F.3d at 144-150; *Alkire*, 716 F.2d at 1018.

that a company's sale of its delivery trucks was a "sham transaction." As the court explained:

> The present case is easily distinguishable from prior instances in which we have upheld NLRB findings of "sham" transactions motivated by anti-union animus. . . *In each of these cases, the transactions occurred between the employer and an "alter ego" that allowed the "disguised continuance" of the employer's operations.*

Id. (emphasis added). Thus, the D.C. Circuit correctly recognized that in the past, whenever the Board has found that an employer has engaged in a "sham transaction" or sham sale of assets, it has consistently applied its alter ego test. *Id.*

In the instant case, the Board's failure either to follow its alter ego precedent or articulate a "reasoned explanation" for departing from this precedent is an "arbitrary and capricious" action violative of the Administrative Procedure Act. 5 U.S.C. §706(2)(A); *Stardyne*, 41 F.3d at 153. *See also Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093-94 (7th Cir. 1984). Furthermore, the Board's ultimate conclusion that NRM continued to control the trucks is irrational. How could NRM exercise dominion over the trucks if the trucks were owned, operated, and maintained by wholly separate third-party corporations? As the *Douglas Foods* court explained:

> While the ALJ and the NLRB are convinced that the truck and route sales were no more than paper transactions, a review of the transactional documents makes clear that *ownership and control* of the trucks changed hands. The ALJ notes that "[o]ne must assume that the purchasers received something of value in exchange for [their] weekly payments." . . . Precisely. It is called "title." *Whatever the motivation for*

> *the sales, it is uncontestable that title has passed to new owners for at least some of the sold trucks. This alone suggests the sales, or at least some of them, were not "sham transactions."*

251 F.3d at 1064 (emphasis added).

B. Had The Board Properly Applied Its Alter Ego Test, It Could Not Have Found That NRM Continued to Control The Trucks After Their Sale

In its alter ego test, the Board considers seven factors to determine whether one corporation controls another. These factors are whether the two enterprises have substantially identical: "management, business purpose, operation, equipment, customers, supervision, and ownership." *Lihli Fashions Corp., Inc. v. NLRB*, 80 F.3d 743, 748 (2d Cir. 1996). *See also Korns Bakery, Inc.*, 326 NLRB 1083; *Bell Energy Management Corp.*, 291 NLRB 168, 174 (1988).

Had the Board applied the alter ego test in this case, it could not have concluded that NRM continued to control the trucks after their sale. The record reflects that the purchasers of the vehicles had total independence on such matters as who would drive their vehicles, what their drivers would be paid, what ICC license they would operate under, whose concrete the trucks would haul, where their trucks would park at night, who would do their repairs, where they would purchase fuel and oil, when preventive maintenance would be done, and what route to take. (*See e.g.* Tr. 172-73, 157-60, 190-203, 316, 342-59, 640-41, 658, 664-66, 691-96, 915, 918, 958-63). At the hearing before the ALJ, the truck purchasers all testified to a high degree of independence in making business and labor relations decisions. (App. 92-98). In short, the purchasers of NRM's trucks were not alter egos of NRM, and NRM did not control the trucks after their sale.

C. The Board's Unprincipled Disregard Of Its Precedents Substantially Disrupts The Ability Of Businesses To Conform Their Actions To The Law

By disregarding its precedents, as in this case, the Board perpetuates confusion and significantly hinders the ability of businesses to conform their actions to the law. While the Board is certainly entitled to change its interpretation of its governing statute, it is required to explain why it is changing its interpretation and how this new interpretation will apply to future cases. *See e.g. Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 896-897 (3d Cir. 1997) ("[I]t is especially unfortunate when the Board puts forth such a patchwork of adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit.").

This Court should grant certiorari in order to rectify the Board's arbitrary decision in this case and to reiterate the Board's duty to adhere to its established precedents or articulate a reasoned explanation for its departure from precedent. Otherwise, unionized employers will continue to suffer from inconsistent and arbitrary application of the law, a result Congress never intended when it passed the NLRA.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted and that this Court either: (1) reverse the Seventh Circuit and find that NRM had no duty to bargain over its decision to sell its trucks and quit the concrete delivery business; or (2) reverse and remand this case with instructions for the NLRB to apply its established precedent—the alter ego test—to determine the legitimacy of NRM's truck sales and

consequently whether NRM has a bargaining obligation over its truck sale decision under *Fibreboard* and *First National Maintenance*.

Respectfully submitted,

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